DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,928

Ward Five (5)

In re: 2940 Carlton Avenue, N.E.

MICHELLE JORDAN
Housing Provider/Appellant

v.

CHONDA SWANN
Tenant/Appellee

DECISION AND ORDER

June 14, 2005

PER CURIAM: This case is on appeal to the Rental Housing Commission (Commission) from a decision and order issued by the Rent Administrator, based on a petition filed in the Rental Accommodations and Conversion Division (RACD). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399 (1991) govern the proceedings.

I. THE PROCEDURES

On August 12, 2003, Chonda Swann, filed tenant petition (TP) 27, 928, which only alleged retaliatory action in violation of § 502 of the Act against Michelle Jordan, the Housing Provider. The rental unit, a single family home, was located at 2940 Carlton Avenue, N.E. On October 14, 2003, both parties were present at the RACD hearing and

proceeded pro se. Senior Hearing Examiner Gerald J. Roper presided at the hearing, and on December 17, 2003, he issued the decision and order.

The decision and order contained the following:

Findings of Fact:

1. Chonda Swann, tenant petitioner, took possession of the single family house at 2940 Carlton Avenue, N.E. in April 2001.

2. At the time the petitioner took possession, there were maintenance and repairs needed in the rental unit. Respondent had made some repairs but there were more repairs to be made.

3. Respondent sued Petitioner for non payment of rent in the District of Columbia Superior Court [in] January 2003 which was resolved by a settlement agreement.

4. Respondent sued Petitioner for non payment of rent in the District of Columbia Superior Court in May 2003.

5. Petitioner's rental unit was inspected by DCRA on July 2, 2003, the Respondent was served with notice of 17 housing code violations by the DCRA Housing Inspection Division.

6. Respondent sued Petitioner for non payment of rent in the District of Columbia Superior Court on July 17, 2003.

7. Respondent began abating the 17 housing code violations cited in 5 above in mid-August 2003.

8. Respondent did retaliate against the Petitioner.

Conclusions of Law:

1. Respondent has engaged in unlawful retaliatory action directed at Petitioner, in violation of D.C. OFFICIAL CODE § 42-3505.02 [sic] by seeking possession of the subject rental unit for non payment of rent after Respondent received notice from DCRA of 17 housing code violations.

2. Pursuant to D.C. OFFICIAL CODE § 42-3509.01 the Respondent [sic] shall be fined for violating the provisions of D.C. OFFICIAL CODE § 42-3505.02.

Swann v. Jordan, TP 27,928 (RACD Dec. 17, 2003) (Decision) at 5.

On January 9, 2004, Michelle Jordan, the Housing Provider, filed an appeal in the Commission and the Commission hearing was held on May 25, 2004.

II. THE NOTICE OF APPEAL

The notice of appeal raised three (3) issues:

A. Whether the hearing examiner erred when he found retaliatory action by Michelle Jordan, Housing Provider.

B. Whether Michelle Jordan, Housing Provider, submitted clear and convincing evidence that she did not have proper notice of the DCRA inspection and the housing code violations.

C. Whether the fine was properly imposed.

III. DISCUSSION

A. Whether the hearing examiner erred when he found retaliatory action by Michelle Jordan, the Housing Provider.

The hearing examiner wrote in the decision:

> Based on the evidence presented there is a presumption that after the Respondent had twice suited [sic] the Petitioner for non payment, the Petitioner requested an inspection of her rental unit where DCRA cited seventeen (17) housing code violations and served the Respondent with notice of these violations prior to the Respondent filing a third complaint for possession for non payment of rent. This action the Hearing Examiner finds was retaliatory action in violation of D.C. OFFICIAL CODE § 42-3505.02.

Decision at 4.

The applicable law on retaliation states:

> (a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include *any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit*, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant or constitute

undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter a judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

(1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;

(2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;

(3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;

(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;

(5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or

(6) Brought legal action against the housing provider.

D.C. OFFICIAL CODE § 42-3505.02 (2001) (emphasis added).

The determination of retaliatory action requires a two step analysis, which is outlined in the provisions of the Act excerpted above. See Norwood v. Peters, TP 27,678 (RHC Feb. 3, 2005). First, it must be determined whether the Housing Provider committed an act that is considered retaliatory under § 42-3505.02(a). Id. "The retaliation statute is applicable only where a landlord takes an action not otherwise permitted by law." Wahl v. Watkis, 491 A.2d 477, 480 (D.C. 1985). The content and timing of the Housing Provider's actions, even if they are lawful, are sufficient to raise the presumption of retaliatory action, if the Housing Provider's actions occurred within six (6) months of the Tenant's request for a DCRA inspection. See De Szunyogh v. William C. Smith & Co., Inc., 604 A.2d 1, 4 (D.C. 1992); See also Norwood v. Peters, TP 27,678 (RHC Feb. 3, 2005). In the instant case, the Housing Provider testified that she sued the Tenant for non payment of rent on July 17, 2003, within six (6) months of the Tenant contacting DCRA on June 27, 2003 requesting an inspection of her housing accommodation. Decision at 3. The Housing Provider's action of suing for possession of the rental unit is considered a presumptive retaliatory act pursuant to the Act which states, "retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit," when the suit was filed within six (6) months following the Tenant's request "to appropriate officials of the District government," for an inspection of her housing accommodation. D.C. OFFICIAL CODE § 42-3505.02(a) and (b) (2001). Although the Housing Provider took an action, suit for non payment of rent, that was permitted by law, the retaliatory action statute still applies, because the Housing Provider took an action listed in § 42-3505.02(a) and did so within six (6) months of the Tenant's actions. D.C. OFFICIAL CODE § 42-3505.02(a) and (b)

(2001). Thus triggering the presumption of retaliation despite the fact that the action was permitted by law. See De Szunyogh, 604 A.2d at 4. Therefore, there is substantial evidence in the record to support finding the action to recover possession of the Tenant's rental unit retaliatory pursuant to § 42-3505.02(a).

Next, once the Housing Provider's actions have been established, it is necessary to determine whether the Tenant raised the presumption of retaliation as outlined under D.C. OFFICIAL CODE § 42-3505.02(b) (2001). See Norwood v. Peters, TP 27,678 (RHC Feb. 3, 2005). If the Housing Provider's conduct occurred within six (6) months of the Tenant performing one of the six (6) listed actions in § 42-3505.02(b), then retaliation is presumed. Here, the Tenant testified that she contacted DCRA on June 27, 2003 to report housing code violations, which is one of the actions listed in the Act that triggers the presumption of retaliation. See id. The Tenant's rental unit was subsequently inspected on July 2, 2003, when seventeen (17) housing code violations were reported. On July 17, 2003, the Housing Provider sued the Tenant for possession of the rental unit due to non payment of rent. Based on the evidence, the Housing Provider acted within six (6) months of the Tenant contacting DCRA, thereby raising the presumption of retaliation.

Finally, after the Tenant successfully raised the statutory presumption of retaliation, the burden then shifted to the Housing Provider to provide clear and convincing evidence that her actions were not retaliatory. See Youssef v. United Mgmt. Co., Inc., 683 A.2d 152, 155 (D.C. 1996). The Hearing Examiner did not perform the analysis on whether the Housing Provider put forth clear and convincing evidence to rebut the presumption of retaliation. The Hearing Examiner recognized that the Tenant raised the presumption of retaliation when he stated, "[b]ased on the evidence presented

there is a presumption that after the Respondent had twice suited [sic] the Petitioner for non payment, the Petitioner requested an inspection of her rental unit where DCRA cited 17 housing code violations ... prior to Respondent filing a third complaint for possession for non payment of rent." Record (R.) at 45. However, the Hearing Examiner did not discuss whether the Housing Provider presented clear and convincing evidence to overcome the presumption. This relates directly to the Housing Provider's main argument raised in her notice of appeal that she had no knowledge of the Tenant reporting the housing code violations to DCRA. Accordingly, the Hearing Examiner erred by failing to perform the analysis on whether the Housing Provider produced clear and convincing evidence to rebut the presumption of retaliation, and is therefore reversed.

B. Whether Michelle Jordan, the Housing Provider, submitted clear and convincing evidence that she did not have proper notice of the DCRA inspection and the housing code violations.

The Hearing Examiner found that there was a presumption that the housing code violation notice dated July 2, 2003 was served on the Housing Provider, and that she produced no further evidence to rebut the presumption of retaliation other than her testimony that she was not served. See Decision at 4. On appeal, the Housing Provider asserts again that she had no knowledge of the housing code violations:

> In fact, I have never received an official notice from DCRA or a notice from the Petitioner regarding the violations. Contrary to the evaluation of the evidence I was not properly served. It was told to me that an official notice was sent on July 9, 2003. It was not received.

Notice of Appeal at 1.

It is necessary to determine whether the Housing Provider received notice of the housing code violations in order to apply the retaliation statute. Retaliation is defined as "an action intentionally taken against a tenant by a housing provider to injure or get back

at the tenant for having exercised rights protected by § 502 of the Act." 14 DCMR § 4303.1 (1991) (emphasis added). If the Housing Provider had no knowledge of the Tenant's actions, then she could not possibly have acted intentionally to "get back at the tenant." Therefore, the Housing Provider's actions could not, by definition, be considered retaliatory even though the actions fall under the retaliation statute. D.C. OFFICIAL CODE § 42-3505.02 (2001).

In the instant case, the evidence in the record that the Hearing Examiner relied upon does not prove that the Housing Provider had notice of the housing code violations. The tenant submitted as evidence with her tenant petition/complaint two (2) housing code violation notices issued by DCRA, one on July 2, 2003 and the other dated July 21, 2003. Record (R.) at 12 & 15. The July 2, 2003 notice is addressed to Michelle Gates-Mercer, Housing Provider, at the residence of 2940 Carlton Avenue, N.E., which is the address of the Tenant's residence, not the Housing Provider's. R. at 15. The second notice dated July 21, 2003 lists the Housing Provider's correct address, but the portion of the form detailing the "name of the person notified" and the "signature of the person receiving notice" identifies Chonda Swann, the Tenant, as the person served. R. at 12. Both of these notices are flawed and in no way indicate that the Housing Provider was actually served notice of the DCRA inspection. In addition, the notice dated July 2, 2003 is the sole support for the Hearing Examiner's finding that the Housing Provider was served with the notice of the housing code violations.[1]

Accordingly, the Commission holds that the Hearing Examiner erred in the finding of fact numbered five (5) that the Housing Provider was properly served with the

[1] At the hearing there was some dispute about a representative attempting to serve the Housing Provider, but the notice was never received because it was improperly addressed. However, no evidence of this was introduced into the record and therefore is not dispositive on the decision.

July 2, 2003 notice of the housing code violations. There is no substantial evidence in the record to support this finding, therefore the Hearing Examiner is reversed on this issue.

C. Whether the fine was properly imposed.

In this decision, the Hearing Examiner fined the Housing Provider $500.00 for retaliation. Decision at 6. The $500.00 fine imposed upon the Housing Provider was also improper. The Court has established that an administrative agency may only impose sanctions when the parties before the agency have been afforded their procedural guarantees with respect to the notice of the agency's proceedings. See Ammerman v. District of Columbia Rental Accommodations Comm'n., 375 A.2d 1060, 1062 (D.C. 1977). Here, there was no evidence introduced supporting the Hearing Examiner's finding that the Housing Provider had notice of the reported housing code violations. Therefore, the imposed fine in this case was not supported by substantial evidence in the record.

Additionally, the fine imposed was improper due to incorrect interpretation of § 42-3509.01(b). Section 42-3509.01(b) states, "[a]ny person who willfully...commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter...shall be subject to a civil fine of not more than $5,000 for each violation." D.C. OFFICIAL CODE § 42-3509.01(b) (2001). Under section 42-3509.01(b), a fine may be imposed only where the "Housing Provider intended to violate or was aware that it was violating a provision of the Rental Housing Act." Miller v. District of Columbia Rental Hous. Comm'n, 870 A.2d 556 (D.C. 2005). Furthermore, the Hearing Examiner is required to make specific findings that the retaliation was committed with the intent to violate the Act or at least with the awareness that a violation

could be found. See id. In the present case, there is not substantial evidence contained in the record to support that the Housing Provider acted willfully and should therefore be fined according to the Act. The only evidence in the record are the reports of the housing code violations that do not prove that the Housing Provider had notice of the Tenant's request for the inspection. The Tenant did not prove the Housing Provider had notice of the Tenant's complaint to DCRA about housing code violations. Therefore, the record does not contain substantial evidence that the Housing Provider acted "willfully" as required by this section of the Act. Accordingly, the Commission holds that the Hearing Examiner erred in imposing the $500.00 fine as a sanction under § 42-3509.01(b) and therefore is reversed on this issue.

IV. CONCLUSION

The Commission found the Hearing Examiner erred by failing to perform the clear and convincing evidence analysis and reverses the finding of retaliation pursuant to D.C. OFFICIAL CODE § 42-3505.02 (2001). The Commission reverses the Hearing

Examiner's determination that the Housing Provider had notice of DCRA inspection.

Also, the Commission reverses the Hearing Examiner's decision to impose a fine as a sanction for retaliatory action under § 42-3509.01(b).

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The Court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERITIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,928 was mailed by priority mail, with confirmation of delivery, postage prepaid this 14 day of June 2005, to:

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